Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

SCOTT D. WELLS,

Petitioner

v.

STATE OF INDIANA

Respondent

On Petition For Writ Of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Wells' conviction for Disorderly Conduct violates his right to Freedom of Speech.

2. Whether the Prosecutor's misconduct in expressing his personal opinion as to the merit of the case against Wells is a constitutional violation, mandating the application of the "harmless beyond a reasonable doubt" standard.

3. Whether a Jury Venire drawn from a county, which has a population of 120,000, with 38,000 of that population being university students, which venire included no university students at all, represents a "fair cross-section of the community".

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING THE PETITION 9
CONCLUSION 12

TABLE OF AUTHORITIES

United States Constitutional Provisions

First Amendment 4
Sixth Amendment 4
Fourteenth Amendment 5

Federal Case Law

28 USC §1257(a) 4
Bailey v. Andrews, 811 F2d 366 (Ct. App 7th Cir. 1987). 11
Meyer v. Grant, 486 U.S. 44 (1988) 13
Bailey v. Andrews, 811 F2d 366, 372 (Ct. App. 7th Cir. 1987) .. 13
Darden v. Wainwright, 477 U.S. 168 (1986) 14
Chapman v. California, 386 U.S. 18, (1967) 14
Taylor v. Louisiana, 419 U.S. 522, (1975) 14

Indiana Constitutional Provisions

Article 1, § 9 13

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Indiana Court of Appeals (App. *infra 1-22*) is reported at 848 N.E.2d 1133 (Ind. Ct. App. 2006). Transfer was denied by the Indiana Supreme Court (App. *infra 23-24*) in an unpublished opinion on October 26, 2006.

JURISDICTION

The Order from which Wells seeks relief is the denial of Transfer by the Indiana Supreme Court, entered on the 26th day of October 2006. The Order affirmed the Opinion of the Indiana Court of Appeals, without elaboration. This Court has Jurisdiction under 28 USC §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

1. First Amendment of the Constitution of the United States. Religious and political freedom. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Sixth Amendment of the Constitution of the United States. Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. Fourteenth Amendment of the Constitution of the United States. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. IC 35-45-1-3 Disorderly Conduct (a) A person who recklessly, knowingly, or intentionally; (2) Makes unreasonable noise and continues to do so after being asked to stop Commits disorderly conduct, a Class B misdemeanor.

STATEMENT

As of the 27th day of September 2002, the Petitioner, Scott Wells [hereinafter referred to as "Wells"], was a tenured science teacher and a duly elected member of the County Counsel of Monroe County, Indiana. Wells was an active Democrat, who was well known for his leadership positions on environmental and development issues. Herman "Bud" Bernitt and his wife, Amy, were local Realtors who were actively involved in the Republican Party and also well known for their opposing positions to those of Wells on environmental and development issues in Bloomington, Indiana. J. D. Maxwell [hereinafter referred to as "Maxwell"], also known as "Boss Hog" was a Sergeant and Evidence Technician with the Indiana State Police and the Republican candidate for Sheriff of Monroe County in the upcoming election.

For many months prior to the 27th of September 2002, the Bernitts had relentlessly attacked Wells at public meetings and in a local Internet political chat room. Wells had filed a defamation suit in which the Bernitts, among others, were named as defendants. The Bernitts were visible and active participants in Maxwell's campaign

for Sheriff, raising money and marching in parades in his behalf. Bud Bernitt had, a few weeks prior to the 27th, attempted unsuccessfully to get a democratic County Councilman, whom he opposed in the election, stopped for claimed impaired driving. Maxwell was aware of Bud Bernitts' unsuccessful efforts.

On Friday, the 27th day of September 2002, in the early evening hours, the Bernitts traveled from their home to a parking lot across the street from the Crazy Horse Bar in downtown Bloomington. They claimed that they were sitting in their truck, deciding what to do next, when they noticed a man wearing a baseball cap, whom they believed to be Wells, walk in an impaired manner past their truck, approach a parked vehicle, walk over to the railroad tracks, urinate, then get into his vehicle and drive away. They claimed that they followed Wells and saw him nearly run over pedestrians. They further claimed that they saw Wells drive to the corner of 6th and Dunn St., park, and walk away. At some point, Bud Bernitt, using his cell phone, called Boss Hog (Officer Maxwell) at his home on his unlisted home phone and told Maxwell, who was off-duty at the time, what they claimed to have seen. Bud Bernitt told Maxwell that the driver was Wells. There was uncontradicted evidence presented that Wells did not actually leave the Crazy Horse until 7:50 p.m., while Bud Bernitt's cell phone records established that his only call *to* Maxwell that night was earlier, at 7:41 p.m., a discrepancy that even the Bernitts could not explain. There was also testimony that Wells had only one beer at the Crazy Horse, and when he left he showed no signs of impairment. All of the police witnesses, other than the state troopers, who gave an opinion as to Wells' intoxication only did so after he had been battered and thrown to the ground. After Wells first parked his vehicle at 6th and Dunn, he went to Nick's, where over an hour and a half he consumed one or two beers and some fried mushrooms. When he left Nick's, he showed no signs of impairment.

After receiving Bud Bernitt's first call, Maxwell called the State Police Post inquiring as to who was on duty and available. After getting the name of Trooper Stacy Brown and another, Maxwell bypassed normal dispatch procedure and asked that Trooper Brown contact him at his home, directly, by telephone. Trooper Brown received the message to contact J.D. Maxwell at 9:08 p.m. Maxwell

did not tell Trooper Brown that the claimed impaired driver was Wells. Maxwell instructed Trooper Brown to go to 6th Street and Dunn to meet Bud Bernitt. He then called the Post again and apologized to the Commander for bypassing the normal Chain of Command by his having directly dispatched Trooper Brown. Maxwell claimed the excuse that he was sleepy and not thinking clearly.

Trooper Brown and his partner Trooper Coryea proceeded directly to 6th and Dunn where Trooper Brown spoke with Bud Bernitt. Trooper Coryea left. Trooper Brown was sitting in his vehicle in the parking lot when Wells approached and got into his vehicle. Trooper Brown observed no signs of impairment in Wells as he approached and got into his vehicle. As Wells pulled away, Trooper Brown saw him fastening his seatbelt. Trooper Brown pulled in behind Wells in his marked police car and followed him to the intersection of 6th and Indiana. Wells made a left turn and proceeded to 7th and Indiana. Wells turned left at the intersection and went west one block toward Dunn on 7th Street. Trooper Brown followed and pulled Wells over, after he turned left onto Dunn Street.

Wells asked why he had been pulled over. Trooper Brown told him that he had been stopped for a seat belt violation. In response, Wells told Brown the he was a County Councilman and that this was a political setup in which Maxwell was involved. Trooper Brown falsely denied Maxwell's involvement and denied any political motivation for the stop. Wells continued to insist (correctly) that Maxwell had orchestrated the stop. Brown returned to his vehicle to radio for back up. By then Brown realized that something was wrong. He knew that Maxwell and Bud Bernitt had withheld important information. He also knew that Maxwell had manipulated the situation. Brown stated on cross exanimation: "After sitting in my car [before getting Wells out of his car and arresting him] and reflecting I believe J.D. Maxwell did know who the driver was going to be, did know that the Bernitts were politically involved, and he [J.D. Maxwell] refused to give me that information for whatever reason." Brown also stated in response to the defense question: "But before you ever laid hands on this man [Wells] you'd put it all together hadn't you?" "I felt that I had been misinformed by Mr. Maxwell, yes sir."

When Trooper Coryea returned, he and Trooper Brown ordered Wells out of hi vehicle. Wells got out, but he continued to protest that it was a poli al set up arranged by Maxwell and the Bernitts. Brown and Coryea continued to deny the involvement of Maxwell and the Bernitts. Wells became more persistent and got louder. He was told to be quiet and cooperate. He said, and later shouted, "I can't believe this is happening." "Not in America." "This is a setup." "This is wrong." They responded by yelling back that he should be quiet and not resist. They approached Wells from either side. They claim that he "bladed-off," assuming a fighting posture. Coryea then violently struck Wells in his leg with his knee, above Wells' knee, in an effort to cause pain, to buckle Wells' leg, and to send him to the ground. All three of them went to the ground, either on a brick sidewalk or a stone stairway. Wells was on the bottom, facedown, while Brown or Coryea attempted to pull his arms behind his back. Brown held Wells on the ground with his knee or shin on Wells' back, while Coryea inflicted another blow to a nerve pathway of Wells' arm, intending to cause Wells even more pain. Brown then subjected Wells to a pressure hold in his neck or jaw area, intending to produce overwhelming, paralyzing pain. Wells was placed in handcuffs and left sitting on the sidewalk. Brown and Coryea claim that throughout these actions, despite being ordered to be quiet, Wells was consistently yelling in protest. Four non-police witnesses who were in the immediate area during these events testified that Wells did not "blade-off," did not resist the police, and that they could not hear what either Wells or the Police were saying when they were less than one-half city block away. The one witness, Joel Chanvisanuruk, who thought someone was "freaking out" and who was physically closest to the scene did not hear any significant obscenities. Joel stated that he called 9-1-1 because he was partly annoyed and partly concerned.

Bernitt watched all of these events from a safe distance, while describing them to his friends via cell phone, for a total of 18 minutes. Wells was taken into custody and transported to the Monroe County Jail. Wells suffered a serious leg injury, a deep abrasion on his forearm and an abrasion to his forehead. Of the several people who testified at trial who actually saw Wells on the evening of the 27th, aside from the Bernitts, not one non-police witness reported observing in Wells any signs of impairment or intoxication.

Based upon these events, Wells was charged with the following offenses:

1) Count I: Operating a Vehicle while Intoxicated in a Manner that Endangered a Person, Class A Misdemeanor.

2) Count II: Battery on a Law Enforcement Officer, Class D Felony.

3) Count III: Resisting Law Enforcement, Class A Misdemeanor.

4) Count IV: Public Intoxication, Class B Misdemeanor.

5) Count V: Disorderly Conduct, Class B Misdemeanor.

6) Count VI: Failure to Use Front Seat Safety Belt, Class D Infraction.

The Honorable Frank M. Nardi [hereinafter referred to as Judge] was appointed as a Special Judge, and Stanley Levco [hereinafter refereed to as Levco] was appointed as a Special Prosecutor. The case was scheduled for trial on the 27th day of October 2003. The State amended Count II, Battery on a Law Enforcement Officer, from a felony to a misdemeanor and dismissed Count IV and Count VI.

On the 20th day of October 2003, Wells filed his Motion to Disqualify the Jury Panel. In response, Judge Nardi, without a hearing, contacted the Court staff and ordered that 20 additional prospective jurors be called, who were under the age of 20. He later reduced the number to 10. Judges Kellams and Todd of the Monroe County Circuit Court, off the record and outside the knowledge of Counsel, contacted Judge Nardi and told him that his Orders could taint the entire remainder of the Monroe County Jury Panel. Judge Nardi rescinded his prior Orders and set the Motion for Hearing.

At the Hearing, all the Jury Questionnaires were stipulated into the record. Eighty prospective Jurors were ordered to appear for this trial. None of them was under 20 years old and there were no Indiana University Students. The average age of the prospective jurors was 48.4 years. Monroe County has a population of 120,000 people. Indiana University has an enrollment of 38,000 students. There is a Student Directory that is published annually, which

contains the current names and addresses of all Indiana University Students. It is similar to a telephone book. It is available to the Monroe County Jury Coordinator. At the hearing, the Judge commented that while he preferred a different selection process, he could not find that either Indiana University students or those under 20 were distinctive groups that were excluded by the selection process. After the hearing on the Defendant's Motion to Disqualify the Jury Panel on October 23, 2003, Judge Nardi denied the motion. The Indiana Court of Appeals affirmed the trial court's denial. This decision was affirmed by the Indiana Supreme Court when it denied the Petition to Transfer.

At trial the Defendant made his motion for a directed verdict as to Count 4: Disorderly Conduct based on the First Amendment and the Indiana Constitutional free-speech protections, which the Court denied. This argument was repeated in Wells' Motion to Correct Errors and again on appeal. The dissent in the Indiana Court of Appeals was premised upon the disorderly conduct conviction being a violation of free-speech rights under the First Amendment and the Indiana Constitution.

On the last day of his trial, the Wells tendered his proposed final jury instruction on disorderly conduct as follows:

Court's Final Instruction No. 3

Disorderly Conduct

> In order to convict the Defendant for disorderly conduct, you must find that he was unreasonably noisy. Noisy protest about police is protected political speech and it becomes unreasonably noisy for purposes of this crime when and only when it inflicts upon a listener other than the police, a level of harm that would sustain a legal suit against the speaker. Thus, mere annoyance or inconvenience of the listener is not sufficient to convict. Shouting or yelling that is not perceived as loud by a person standing across the street is likewise not sufficient to convict.

The State objected to this instruction and Wells argued that without this instruction, the jury would be unaware of the protections afforded to his protest by the First Amendment to the U.S. Constitution and the Indiana Constitution, that there is a different standard for conviction in this case because of the First Amendment and the protections afforded to political speech.

The trial court refused the tendered instruction defining the first-amendment, free-speech protections and sent the case to the jury with nothing more than the statutory definition of Disorderly Conduct as its guide to the law. The jury returned a verdict of guilty on disorderly conduct, while acquitting Wells of battery on a police officer and resisting law enforcement both of which were alleged to have occurred at the same time. This issue was raised as a constitutional issue at the trial court level and on appeal citing *Bailey v. Andrews*, 811 F2d 366 (Ct. App 7th Cir. 1987). In affirming Wells' conviction for Disorderly Conduct, this argument was ignored by two judges of the three-judge panel on the Indiana Court of Appeals. One judge accepted and amplified this constitutional violation of free-speech rights in her dissent.

At the very beginning of his Final Argument, Levco said to the Jury "If there had been the slightest bit of critical evidence that Trooper Brown and Coryea conspired with J.D. Maxwell or Bud Bernitt to arrest the Defendant, I wouldn't have prosecuted this." After approaching the bench, Defense Counsel stated, "That's a mistrial Judge. Personally vouching for his case. Absolutely improper." The Judge, without articulating a ruling denied the Motion for a Mistrial, sustained an objection, and instructed the jury to disregard Levco's comment. This issue was raised on appeal citing the constitutional violations inherent in this type of prosecutorial misconduct. The Indiana Court of Appeals rejected this argument without dissent.

The jury found Wells, as to Count1: Guilty of the lesser-included offense of Driving While Intoxicated Without Endangerment as a Class "C" Misdemeanor; Count 2: Not Guilty of Battery of a Law Enforcement Officer; Count 3: Not Guilty of Resisting Law Enforcement; Count 4:Guilty of Disorderly Conduct as a Class "B" Misdemeanor. The Court entered judgment on Counts 1 and 4. On February 13, 2004, the Defense filed a Motion to Correct Error from

the denial of the directed verdict based on the free-speech constitutional protections on Count 4: Disorderly Conduct. The trial court denied this Motion to Correct Error. This case was then appealed to the Indiana Court of Appeals.

On June 15, 2006, a three-judge panel for the Indiana Court of Appeals issued an Opinion in which two of the judges affirmed the convictions. The third judge issued a dissent as to Wells' conviction for Disorderly Conduct, in which she stated that Indiana Constitutional protections are broader than those based on the First Amendment to the U.S. Constitution, that Wells engaged in protected political speech under the First Amendment to the U.S. Constitution when he loudly protested his stop and arrest leading to his conviction for Disorderly Conduct, and that his conviction for Disorderly Conduct should, therefore, be reversed. She joined the majority on all other issues.

On the Petition for Reconsideration, the panel again split with two judges denying the Petition in all important aspects with Judge Riley in dissent stating that she would have reheard the entire case. On October 26, 2006, the Indiana Supreme Court denied the Petition to Transfer.

Scott Wells was the target of a political set-up, and he knew and protested it while it was happening. He was acquitted of the charges that were based solely on the testimony of Bud Bernitt, J. D. Maxwell, Trooper Brown and Trooper Coryea: OWI With Endangerment, Resisting Law Enforcement, and Battery on a Police Officer. He was convicted of Disorderly Conduct for his protected political speech and of OWI Without Endangerment based on the testimony of those who saw him and heard him only after he had been physically abused by the troopers, who were doing his political opponents' and their police supervisor's bidding. Because of the infirmities found in his trial and the overall taint of his arrest and prosecution and because of the constitutional violations resulting from these actions, all of which were raised when they occurred and on appeal, Wells' convictions should be overturned.

REASONS FOR GRANTING THE PETITION

This Court should grant Certiorari Review on the Disorderly Conduct / Free Speech issue because:

1. The Indiana Court of Appeals held that Wells' speech was not protected political speech under the Indiana Constitution, Article 1, § 9, because:

a. When an individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. "Wells' loud disturbance was only about himself and his predicament." The defendant has the burden of establishing that particular speech is political, and if there is ambiguity about the nature of certain speech, Courts should err on the side of concluding that it is not political. Wells' speech was ambiguous and, therefore, not political.

b. Wells objected to the application of IC 35-45-1-3 to his conduct, based upon both Articles 1, Sec. 9 of the Indiana Constitution, and his Right to Freedom of Speech under the First Amendment of the Constitution of the United States. He moved for a Directed Verdict and for a Jury instruction, which he tendered, based upon, in part, his right to Freedom of Speech. His Motion was overruled and his Jury Instruction was refused. He attempted repeatedly and unsuccessfully to invoke the protections of the First Amendment, made applicable to the State by the Fourteenth Amendment. *Meyer v. Grant*, 486 U.S. 44 (1988) Wells also based his appeal on his First Amendment right to free speech as cited in *Bailey v. Andrews*, 811 F2d 366, 372 (Ct. App. 7th Cir. 1987).

c. Since the Indiana Court of Appeals and the Indiana Supreme Court refused to address Wells' First Amendment claims, (See Opinion footnote 8.) this Court should grant Certiorari Review. Under First Amendment standards, Wells' speech was political and protected, because he was claiming misconduct in his arrest by his political enemies and public officials,

acting under color of State Law. These words and actions of Wells were core protected political expression. This Court should grant him Certiorari review, and afford him the First Amendment protections, which have been denied him by the Courts of the State of Indiana.

2. This Court should grant certiorari review of the Prosecutorial Misconduct Issue because while the Indiana Court of Appeals held that the Prosecutors expression of his personal opinion as to the merit of his case constituted misconduct, they refused to recognize a constitutional violation and apply the "harmless beyond a reasonable doubt" standard of review. Instead they applied the "grave danger" standard of review. The Prosecutor's misconduct deprived Wells of his constitutional right to Due Process of Law, secured to him by the Fourteenth Amendment, see *Darden v. Wainwright*, 477 U.S. 168 (1986), and his right of Confrontation secured to him by the Sixth Amendment of the Constitution of the United States. In refusing to apply the "harmless beyond a reasonable doubt standard" of *Chapman v. California*, 386 U.S. 18, (1967) the Indiana Court of Appeals decided an important question of Federal Law in a way that conflicts with other relevant decisions of this Court.

3. This Court should grant Certiorari review of the Jury Selection Issue because while the Indiana Court of Appeals recognized that the Sixth Amendment of the Constitution of the United States guarantees a criminal defendant trial by a jury which reflects a reasonable cross-section of the community, they refused to acknowledge university students as a "distinctive group", and thereby validated a venire which excluded nearly one-third of the county's otherwise eligible residents.

It is fundamental that one accused of a crime is entitled to have his guilt or innocence determined by a jury of his peers, drawn from a fair cross-section of the community. To constitute a fair cross-section, the Venire must be truly inclusive, and "the exclusion of identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial." *Taylor* v. *Louisiana,* 419 U.S. 522, (1975)

Bloomington Indiana is the home of Indiana University, and approximately one-third of its residents are college students. The Indiana Court of Appeals held that Wells failed to establish college students as a "distinctive group" by demonstrating their common attitudes, ideas, and experiences. This was not his burden. Students may be defined as a group by their diversity, as apposed to their homogeneity. Wells did meet his burden by establishing that university students are an identifiable segment of the population, playing a major role in the community, and they are wholly excluded from jury venires. Wells' jury, selected from such a venire, did not represent a fair cross-section of the community, in violation of his right to a jury trial under the Sixth Amendment of the Constitution of the United States. The Indiana Court of Appeals decided this important Federal question in a manner that conflicts with relevant decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

A. Published Opinion from the Indiana Court of Appeals (June 15,2006) 1a

B. Order of the Indiana Supreme Court (October 26, 2006) 23a

FOR PUBLICATION

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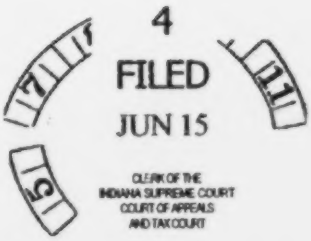

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IN THE COURT OF APPEALS OF INDIANA

SCOTT D. WELLS,	)	
Appellant-Defendant,	)	
	)	
vs.	)	
	)	No.53A01-0405-CR-229
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Frank Nardi, Judge
Cause No. 53C04-0211-FD-1030

June 15, 2006

OPINION - FOR PUBLICATION

BARNES, Judge

Case Summary

Scott Wells appeals his convictions for Class C misdemeanor operating a vehicle while intoxicated ("OWI") and Class B misdemeanor disorderly conduct. We affirm.

Issues

We restate and reorder the issues before us as:

I. whether the jury venire represented a fair cross-section of the community of Monroe County;

II. whether the trial court properly denied Wells's motion for a continuance;

III. whether the State committed prosecutorial misconduct during closing argument;

IV. whether the statutes defining the offense of OWI are void for vagueness; and

V. whether Wells's disorderly conduct conviction violates his right to free speech under Article 1, Section 9 of the Indiana Constitution.

Facts

The following facts reflect the evidence in a light most favorable to the convictions. In 2002, Wells was a Bloomington city councilman. Bud and Amy Bernitt, as well as their acquaintance, Indiana State Police Sergeant J.D. Maxwell, also were involved in local politics, but at the other end of the political spectrum from Wells. On September 27, 2002, Bud called Sergeant Maxwell at his

home to inform him that he believed Wells was driving a vehicle while intoxicated. Bud reported that he had seen Wells leave the Crazy Horse bar in Bloomington, then drive erratically to the comer of Sixth and Dunn Streets, where Wells exited his car and urinated in the street.

Sergeant Maxwell called State Police dispatch to see if any troopers were available to investigate Bud's report. After learning that Trooper Stacy Brown was available, Sergeant Maxwell asked the post commander to have Trooper Brown call him at home, which deviated from regular State Police procedure. When Trooper Brown called, Sergeant Maxwell told him Bud's story and asked him to meet the Bernitts in a parking lot near Sixth and Dunn Streets. The Bernitts related what they had seen and gave Trooper Brown a description of Wells and his vehicle, but did not reveal that they knew Wells.

Trooper Brown then left and soon thereafter located Wells's vehicle parked illegally. He called to have the vehicle towed, but Wells got into the vehicle and drove away before a tow truck could arrive. At first, Wells was not wearing his seatbelt, but he put it on after driving by and seeing Trooper Brown's police car. Trooper Brown then pulled behind Wells and saw Wells make a sharp turn around a comer, head to the curb, then overcorrect so that Wells was straddling the center line of the street. Trooper Brown then initiated a stop of the vehicle.

When Trooper Brown approached Wells's vehicle, the window was rolled up and Wells had evident difficulty rolling the window down but finally was able to do so. Trooper Brown asked Wells for his license and registration, and Wells responded by asking repeatedly why he had been stopped, sometimes using profane language. Pursuant to Trooper Brown's training and usual practice, he asks for a license and registration before advising a driver why he or she has been pulled over. Finally, Wells attempted to give his license to Trooper Brown but had difficulty finding and removing it from a stack of cards held together by a rubber band, even though the license was on top of the stack.

Trooper Brown then told Wells that he had been pulled over for not wearing a seatbelt. Wells again responded by being argumentative and using profane language. When Trooper Brown also told Wells of his

erratic driving and the report that he had urinated in the street, Wells called Trooper Brown a "f***ing liar." Tr. p. 149.

At this point, Trooper Brown noticed the smell of alcohol on Wells's breath. Trooper Brown also noticed that Wells's eyes were red and watery and that his speech was sometimes slurred and mumbled. Wells also began asking Trooper Brown if he knew who Wells was, and Trooper Brown responded that he did not know and did not care. Wells also asked if Trooper Brown knew Sergeant Maxwell, and when Trooper Brown said he did, Wells began stating that he had been "set up" by Maxwell. Id. at 152. Trooper Brown later admitted that he was unhappy with Sergeant Maxwell's actions, but nevertheless believed that the Bernitts' report that Wells was driving while intoxicated was proven to be correct.

Because Wells was being belligerent and highly emotional, and as part of normal protocol for investigating a possible OWI, Trooper Brown called Trooper Travis Coryea for assistance. Before Trooper Coryea arrived on the scene, a nearby resident, Joel Chanvisanuruk, called 911 because Wells was "freaking out." Id. at 278. Specifically, Wells was shouting and screaming extensively and appeared to be angry to the extent that Chanvisanuruk was concerned for Trooper Brown's safety and thought he needed backup to help deal with Wells.

When Trooper Coryea arrived, he and Trooper Brown repeatedly asked Wells to get out of his car before Wells finally did so. Wells had difficulty exiting the car; he started to fall backwards in the car when he turned in his seat to exit and had to pull himself up on the steering wheel before getting out, and after getting out he again started to fall backwards before reaching back and steadying himself on the car and closing the door. Wells refused to perform any field sobriety tests and again yelled that he was being embarrassed "because of that motherf***er J.D. Maxwell ...." Id. at 160. When Trooper Brown attempted to inform Wells of the implied consent law, Wells repeatedly interrupted him by yelling obscenities and asserting that he had been set up. Throughout Trooper Brown's interaction with Wells, he repeatedly asked Wells to quiet down, but Wells did not do so.

When Wells refused to take a breath test after being read the implied consent law, Trooper Brown decided to place Wells under arrest. After learning this, Wells refused to cooperate with Trooper Brown and Coryea's attempts to handcuff him and place him in a police car. Again,

Wells repeatedly yelled obscenities at the troopers in connection with his claim that he had been set up.

On November 7, 2002, the State charged Wells with Class A misdemeanor OWI, Class D felony battery on a law enforcement officer, Class A misdemeanor resisting law enforcement, Class B misdemeanor public intoxication, Class B misdemeanor disorderly conduct, and Class D infraction failure to use a seat belt. The State later amended the information to remove the public intoxication and seat belt charges. Before trial, Wells moved to disqualify the jury panel because it contained no Indiana University--Bloomington students. The trial court denied the motion. On November 12, 2003, a jury found Wells guilty of Class C misdemeanor OWI, a lesser-included offense of Class A misdemeanor OWI, and of disorderly conduct; it acquitted Wells of resisting law enforcement and battery on a police officer. Wells now appeals.

Analysis

I. Jury Venire

Wells contends that the jury venire for his trial did not represent a fair cross section of the Monroe County community, in violation of the Sixth Amendment to the United States Constitution. Specifically, Wells notes that the jury venire included no students attending Indiana University-Bloomington ("IU"). He also claims that those students comprise almost one-third of Monroe County's census population, or approximately 38,000 out of 120,000 residents.

"[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. 522, 528, 95 S. Ct. 692, 697 (1975). The jury selection process should operate to reflect a reasonable cross-section of the community from which the venire is drawn. Wilder v. State, 813 N.E.2d 788, 791 (Ind. Ct. App. 2004), traps. denied (disapproved of on other grounds by Laux v. State, 821 N.E.2d 816, 820 n.4 (Ind. 2005)). There is no requirement, however, that jury panels be a microcosm of a county or a court district. Id. "Jurors need not be mathematically proportioned to the character of the

community, and there is no requirement that any particular class be represented on every jury." Id. The primary requirement is that the selection of a jury venire should not be arbitrary. Id.

In order to establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of showing: 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this under-representation is due to systematic exclusion of the group in the jury selection process. Id. If a defendant makes a prima facie showing that he has been denied his right to have a jury drawn from a fair cross section of the community, the burden shifts to the State to justify the selection process by showing that attainment of a fair cross-section is incompatible with a significant state interest. Id. at 791-92.

Indiana's jury pool selection method is governed by statute. Azania v. State, 778 N.E.2d 1253, 1256 (Ind. 2002). Indiana Code Section 33-28-4-3(c) allows jury commissioners to use a computerized jury selection system, but requires that the system employed "must be fair and may not violate the rights of persons with respect to the impartial and random selection of prospective jurors." Our supreme court has held that our state jury selection statute, in requiring an "impartial and random selection," demands no less than the Sixth Amendment. Id. at 1259.

The manner in which Monroe County selected the jury venire for Wells's case comported with the jury selection statute. It utilized voter registration and property tax records, as required by subsection (a) of Indiana Code Section 33-28-4-3, and supplemented those lists with records of the Bureau of Motor Vehicles, as permitted by subsections (f) and (g) of the same statute.[1] The fact that this selection method resulted in no IU students in Wells's jury pool would seem to indicate that many do not consider themselves to be part of the Monroe County "community" to the extent that they have voted, purchased property, or obtained a driver's license or

[1] Effective July 1, 2006, Indiana Code Section 33-28-4-3 will place sole responsibility for determining lists of prospective voters with the Indiana Supreme Court; there will no longer be a set statutory basis for the source of jury pools. See P.L. 80-2006 § 4.

registered a vehicle in the county. Also, to the extent some IU students have voted, purchased property, or registered with the BMV as a Monroe County resident, there was evidence presented that a large number of jury questionnaires sent to these students are returned by the post office as undeliverable and often no current address for these students can be readily found. This further supports the conclusion that most IU students are not permanent members of the Monroe County "community."

We also conclude that Wells has failed to meet his burden of demonstrating that IU students constitute a distinctive group within the Monroe County community for purposes of a fair cross-section analysis. This court has held, "` [B]efore exclusion may be held improper, there must be a common thread running through the excluded group[,] a basic similarity of attitudes, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community.'" Moore v. State, 427 N.E.2d 1135, 1138 (Ind. Ct. App. 1981) (quoting Adams v. Superior Ct. of San Diego Co., 524 P.2d 375, 379 (1974)). Our supreme court previously "has explicitly rejected the contention that persons between eighteen and twenty four years old are a distinctive group" for fair cross-section purposes. Ewing v. State, 719 N.E.2d 1221, 1226 (Ind. 1999). Most IU students would fall into this age category, but Wells attempts to avoid the holding of cases like Ewin by arguing that it is not only the age of the students that is relevant, but also that they "are more diverse in their ethnic, racial, and religious characteristics than the rest of the population" of Monroe County. Appellant's Br. p. 38. This seems to directly contradict the Moore requirement of a "distinctive" group within a community sharing common attitudes, ideas, and experiences.

Any conclusion that college students are somehow "different" from other members of the community would have to rely on stereotypical assumptions about them; i.e., that college students as a whole think differently, on average, from other members of society as a whole and on average. We decline to engage in such unsupported speculation. Wells has failed to establish the first prong of the test for establishing a prima facie violation of the fair cross-section requirement.

We also observe, as has the Supreme Court, that most cases finding a violation of the fair cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment have involved groups such as African-Americans, women, and Mexican-Americans. See Lockhart v. McCree, 476 U.S. 162, 175, 106 S. Ct. 1758, 1766 (1986) (citing Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 2163 (1972); Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664 (1979); Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977)). The Court identified several special concerns in cases where such groups were excluded from jury pools, including that such exclusion was "completely unrelated to the ability of members of the group to serve as jurors in a particular case," the exclusion was on the basis of immutable characteristics such as race, gender, or ethnic background, and that "such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases." Id. No such concerns are present in this case concerning the exclusion of IU students from Wells's jury pool, which appears to have resulted from the fact that such persons generally are not permanent residents of the Monroe County community and not because of any improper reason.[2] We perceive no violation of the Sixth Amendment in the selection of Wells's jury venire.

II. Motion for Continuance

Wells contends the trial court erred in refusing his request for a brief continuance before the commencement of voir dire. The request was made after the State belatedly revealed certain evidence not previously made available to Wells during the normal course of discovery. The evidence consisted of audiotapes of police radio traffic on the night of Wells's arrest, which allegedly might support a conclusion that law enforcement officials wished to "cover up" certain

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[2] Also, unlike a distinctive gender or ethnic group within a community, N students are not an unchanging groups of persons within the community. Although the total enrollment at the university may be relatively constant, the particular identities of the students are constantly changing as graduating or transferring students are replaced with new students.

details of the incident.[3] The existence of the tapes was first disclosed on the day before voir dire was set to begin. On the morning of voir dire, counsel for Wells stated that he had not yet received all of the State's transcripts of the tapes, and counsel requested that voir dire be delayed for an hour and a half in order to obtain and review the transcripts. The trial court denied this specific request, but expressed displeasure at the State's late disclosure of the evidence and did agree to delay the presentation of evidence to the jury until Wells had had an opportunity to review the new evidence.

Wells does not argue that his continuance motion was based upon grounds set forth in Indiana Code Section 35-36-7-1. Rulings on non-statutory motions for continuance are within the sound discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. Schmid v. State, 804 N.E.2d 174, 177 (Ind. Ct. App. 2004), trans. denied. An abuse of discretion occurs only if a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Because the continuance in this case was requested following the State's alleged violation of a discovery order, we also note that absent clear error and resulting prejudice, the trial court's determination of discovery violations and sanctions ordinarily will be affirmed. Fleming v. State, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005). "When reviewing a challenge to discovery matters, we must give a trial court wide discretionary latitude." Id. "In cases where there has been a failure to comply with discovery procedures, the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated." Id. A continuance is usually the proper remedy if a discovery violation warrants remedial measures. Id. Although the negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal, an appellant must affirmatively show that there was error prejudicial to his or her substantial rights before reversal is warranted. Id. at 92.

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[3] Wells, however, admits in his brief, "While the evidence did contain some evidence of a cover-up, in retrospect that issue did not warrant the attention it received, injury selection, opening statement, and the trial." Appellant's Br. p. 44.

Wells does not argue that he was not, in fact, given sufficient time to prepare for the presentation of evidence to the jury after the late disclosure of the audiotapes. Instead, he argues that he was disadvantaged by not fully knowing the contents of the tapes before conducting voir dire of the potential jurors. To address this argument, it will be helpful to review the purpose and regulation of voir dire in Indiana.

The function of voir dire examination is not to educate jurors. Perryman v. State, 830 N.E.2d 1005, 1008 (Ind. Ct. App. 2005). Instead, it is to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. Id. "Jurors are to be examined to eliminate bias but not to condition them to be receptive to the questioner's position." Id. Questions that seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are improper. Id.

At the same time, proper examination may include questions designed to disclose the prospective jurors' attitudes about the type of offense charged in order to allow the parties to intelligently exercise challenges. Id. Similarly, the parties may attempt to uncover the prospective jurors' preconceived ideas about a defense the defendant intends to use. Id. "To make these determinations, the parties may pose hypothetical questions, provided they do not suggest prejudicial evidence not adduced at trial." Id.

In the present case, it is clear that a central tenet of Wells's defense was that he had been improperly "set up" by local law enforcement and political opponents. This was true practically from the moment Wells was first pulled over by Trooper Brown. Any voir dire conducted by Wells's counsel of prospective jurors could have been tailored to assess their preconceived ideas about the trustworthiness of law enforcement and their potential receptivity to a defense centered on an alleged abuse of police power by political operatives, regardless of whether counsel knew the full contents of the late-appearing audiotapes. Those tapes merely had the potential to enhance claims of abuse of power, not to create an entirely new defense. In any event, Wells's counsel properly would have been precluded from delving into details of his prospective defense during voir dire.[4]

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[4] Wells did not request a transcript of the voir dire for this appeal, so we do not know precisely what questions were asked of the prospective jurors.

See Perryman, 830 N.E.2d at 1008. Given this, and that the trial court was in the best position to determine the appropriate remedy for the State's discovery violation, we cannot say the court abused its discretion in fashioning a remedy that included delaying the presentation of evidence to the jury, but not delaying the commencement of voir dire. We also find no definitive prejudice to Wells resulting from the discovery violation and the trial court's remedy for it.

III. Prosecutorial Misconduct

Wells also claims that one of the prosecutors engaged in misconduct during closing argument by stating, "If there had been a slightest bit of credible evidence that Trooper Brown and Coryea conspired with J.D. or Bud Bernitt to arrest the Defendant, I wouldn't have prosecuted this." Tr. pp. 1431-32. Wells immediately objected to this comment. The trial court sustained the objection and directed the jury to disregard the comment. However, the court did not grant Wells's contemporaneous motion for a mistrial.

Reversal of a conviction based on a claim of prosecutorial misconduct requires a determination that the misconduct had a probable persuasive effect on the jury's decision. Rodriguez v. State, 795 N.E.2d 1054, 1058 (Ind. Ct. App. 2003), trans. denied. When reviewing a properly preserved claim of prosecutorial misconduct, such as Wells's, we first determine whether the prosecutor engaged in misconduct and then consider whether, under all of the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril to which he or she should not have been subjected. Id. "This inquiry depends upon an analysis of the probable persuasive effect any misconduct had on the jury's decision, and whether the alleged misconduct was repeated such that it appears that the prosecutor engaged in a deliberate attempt to improperly prejudice the defendant." Id. at 1059. Additionally, a mistrial is an extreme remedy that is warranted only when less severe sanctions will not satisfactorily correct the error. Id. A decision to deny a motion for a mistrial is within the trial court's discretion. Id.[5]

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[5] Wells argues in his brief that the prosecutor's comment amounted to a federal constitutional violation, and we must review whether this violation is harmless

Wells claims that the prosecutor's statement constituted impermissible vouching prohibited by Section 3.4(e) of the Indiana Code of Professional Responsibility, which states:

> A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused ....

We agree that under this rule, it was improper for the prosecutor to express his personal opinion as to the merits or justness of the case against Wells.

We cannot conclude that Wells suffered grave peril as a result of this conduct. First, the one-sentence comment occurred in the midst of a closing argument by the State that spans over eighty pages in the transcript and that was divided between two attorneys because of its length. Wells points to no other comments made by either prosecutor that would have warranted a mistrial. The statement appears to have been a one-time mistake by the prosecutor, not part of a deliberate and concerted effort to unfairly prejudice Wells.

Second, the trial court immediately recognized and appropriately addressed the statement by directing the jurors to disregard the statement. It also gave final instructions informing the jurors that they were the

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beyond a reasonable doubt. He cites for this proposition United States v. Cotnam, 88 F.3d 487 (7th Cir. 1996), cert. denied, 519 U.S. 942, 117 S. Ct. 326 (1996). However, the Cotnam case concerned prosecutorial argument that infringed upon the defendant's Fifth Amendment right not to testify. The Cotnam opinion very clearly delineates that general prosecutorial misconduct claims that do not infringe upon a specific constitutional right are evaluated under a different standard, i.e. generally whether the defendant was deprived of a fair trial because of the alleged misconduct. See id. at 497-98. The opinion nowhere states that general prosecutorial misconduct claims are reviewed under the harmless beyond a reasonable doubt standard, but rather quite clearly indicates that they are not. See id. at 500 n.14. Wells's prosecutorial misconduct claim is a general one, not an allegation that a specific constitutional violation occurred. We review his claim under the well-settled Indiana standard recited in Rodriguez.

exclusive judges of the evidence, and that unworn statements of counsel were not evidence they could consider in reaching their decision. Given the isolated nature of the prosecutor's objectionable comment and the trial court's admonition and instructions to the jury, we cannot say the trial court abused its discretion in denying Wells's motion for a mistrial, nor do we believe reversal of his convictions is required.

IV. Vagueness of OWI Statutes

Next, we address Wells's claim that the statutes defining the offense of Class C misdemeanor OWI are unconstitutionally void for vagueness.[6] Indiana Code Section 930-5-2(a) provides, "a person who operates a vehicle while intoxicated commits a Class C misdemeanor." Indiana Code Section 9-13-2-86 defines "intoxicated" as being under the influence of alcohol or another substance "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Wells argues that a person of ordinary intelligence would be unable to determine the conduct prohibited by the statutes because they do not precisely define what amount of alcohol consumption could lead to a finding of impairment under the laws. Wells also contends that the vague nature of the statutes could lead to arbitrary and discriminatory enforcement of the laws.

Initially, we note that challenges to the constitutionality of a criminal statute generally must be raised through a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). We see no indication in the record that Wells ever filed any such motion with respect to the OWI charge. Although we could consider this issue waived for our review, we choose to address it on the merits.

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[6] Wells states the issue in his brief as whether the OWI statutes "violate the due process guarantees of the Indiana Constitution in the context of this case . . . ." Appellant's Br. p. 30. The Indiana Constitution has no due process clause, but instead has a due course of law provision. See Ind. Const. art. 1, § 12. Regardless, Indiana courts have reviewed claims of unconstitutional vagueness in the same manner, whether the defendant invokes the United States Constitution, the Indiana Constitution, or both. See Bemis v. State, 652 N.E.2d 89, 92 (Ind. Ct. App. 1995).

We begin with a "presumption of constitutionality" when the validity of a statute is challenged. State v. Lombardo, 738 N.E.2d 653, 655 (Ind. 2000). The party challenging the statute bears the burden of rebutting this presumption, and all reasonable doubts must be resolved in favor of the statute's constitutionality. Id. "A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct." Id. at 656. The statute need only inform the individual of the generally proscribed conduct, and need not list with exactitude each item of conduct prohibited. Id. Finally, vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in light of the particular facts of the case at hand. Id.

Criminalizing operating a vehicle while intoxicated does not impact any First Amendment freedoms. Thus, we will examine the specific facts of this case to determine whether Wells was put on sufficient notice that the OWI statutes prohibited his conduct. The evidence most favorable to the OWI conviction reveals that Wells was unsteady on his feet and had difficulty exiting his car, had impaired manual dexterity, had bloodshot eyes and slurred or mumbled speech, was loud and belligerent, and smelled of alcohol. These are all clear signs of intoxication. See Dunklev v. State, 787 N.E.2d 962, 965 (Ind. Ct. App. 2002). A person of ordinary intelligence reasonably should be on notice that driving a vehicle while exhibiting such signs is illegal and prohibited by the OWI statutes. See Lombardo, 738 N.E.2d at 656 (holding that person of ordinary intelligence would be on notice that defendant's particular conduct in that case violated the anti-wiretapping statute).

Wells contends that because there is not a crystal clear definition of what constitutes "intoxication," persons could never know whether they had reached that threshold before making a decision whether to drive a vehicle. First, we note again that there were clear indications in this case that Wells was intoxicated and should not have been driving. Second, to the extent that persons who have been drinking might have some doubt as to whether they are legally "intoxicated," it surely is reasonable to ask such persons to err on the side of caution and not

drive.[7] Third, we reiterate that criminal statutes need not be written with the degree of exactitude that Wells seems to be demanding. See id.

Wells also seems to contend that the OWI statutes were rendered unconstitutionally vague by 2001 amendments to the statutes. Prior to the 2001 amendments, Indiana Code Section 9-30-5-2 provided for one offense of Class A misdemeanor OWL Also, Indiana Code Section 9-13-2-86 defined "intoxicated" as "an impaired condition of thought and action and the loss of normal control of a person's faculties to an extent that endangers a person." The 2001 amendments removed "to an extent that endangers a person" from the definition of "intoxication," created the offense of Class C misdemeanor OWI, and provided that OWI is a Class A misdemeanor if the person is so intoxicated that driving a vehicle endangers a person.

We fail to see how the 2001 amendments rendered the OWI statutes unconstitutionally vague. Conviction for Class A misdemeanor Owl still requires prove of intoxication to a degree that operating a vehicle results in endangerment to any person. The creation of the new Class C misdemeanor OWI offense does not require definitive proof of endangerment, but it still requires proof of impairment. The argument could be made that driving a vehicle while intoxicated always endangers someone. However, it might not always be possible to prove such endangerment beyond a reasonable doubt to a fact-finder's satisfaction, and that clearly was the case here. Regardless of whether there is intoxication to the point of endangerment, persons of reasonable intelligence still are on clear notice that driving while impaired, or while exhibiting signs of impairment such as Wells did here, is illegal. Wells has not met his burden of establishing that the OWI statutes are void for vagueness.

V. Disorderly Conduct

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[7] Also, to the extent a person might have decreased judgment as to whether they are intoxicated, once they are in fact intoxicated, voluntary intoxication is not a defense to any crime in Indiana. See Sanchez v. State. 749 N.E.2d 509, 517 (Ind. 2001). Clearly, allowing persons to claim they lacked the faculties to determine whether they were intoxicated because they were intoxicated would vitiate the OWI statutes.

Finally, we address Wells's argument that his conviction for disorderly conduct violates Article 1, Section 9 of the Indiana Constitution[8] Article 1, Section 9 states, "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, on any subject whatever: but for the abuse of that right, every person shall be responsible." The portion of the disorderly conduct statute under which Wells was charged and convicted states, "A person who recklessly, knowingly, or intentionally ... [m]akes unreasonable noise and continues to do so after being asked to stop ... commits disorderly conduct ...." Ind. Code § 3 5-45-1-3.

When reviewing whether the State has violated Article 1, Section 9, we first must determine whether state action has restricted a person's expressive activity. See U.M. v. State, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005). There is no question that Wells's conviction for disorderly conduct based on his yelling at Troopers Brown and Coryea satisfies this first requirement.

If, as here, state action has restricted a person's expressive activity, the court then must decide whether the restricted activity constituted an "abuse" of the right to speak. See id. In the ordinary case, the reviewing court is typically only required to find the State's determination of an "abuse" to be rational. See id. If, however, a claimant is able to show that the expressive activity was "political," the State must demonstrate that it did not "materially burden" the claimant's opportunity to engage in political expression. Id. The State does not "materially burden" "political" expression if the restricted speech "inflicted particularized harm analogous to tortious injury on readily identifiable private interests." Id. "Evidence of mere annoyance or

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[8] Wells frames this issue in his "Statement of the Issues" as whether the trial court improperly refused to instruct the jury regarding the offense of disorderly conduct. However, the argument section of his brief contains no case law or analysis concerning the proper standard for reviewing the giving or refusal of jury instructions and instead focuses generally on whether his disorderly conviction violates Article 1, Section 9. Thus, that is how we will address this issue. Additionally, Wells refers to the First Amendment to the United States Constitution and "the First Amendment protection for political protest under the Indiana Constitution." Appellant's Br. p. 15. The only cogent argument in the brief, however, concerns Article 1, Section 9 of the Indiana Constitution, and that is the only constitutional provision we will address here.

inconvenience is not sufficient" to justify restricting political speech. Id.

The difficult question in this case is whether Wells's tirade following the stop by Trooper Brown constituted political speech. Expressive activity is political if its point is to comment on government action, including criticizing the conduct of an official acting under color of law. Whittington v. State, 669 N.E.2d 1363, 1370 (Ind. 1996). "In contrast, where an individual's expression focuses on the conduct of a private party-including the speaker himself or herself--it is not political." Id. Courts judge the nature of expression by an objective standard, and the burden is on the claimant to demonstrate that his or her expression would have been understood as political. Id. "If the expression, viewed in context, is ambiguous, a reviewing court should find that the claimant has not established that it was political and should evaluate the constitutionality of any state-imposed restriction of the expression under standard rationality review." Id.

In Price v. State, 622 N.E.2d 954 (Ind. 1993), our supreme court first set forth the special protection afforded political speech under Article 1, Section 9 of the Indiana Constitution and reversed the disorderly conduct conviction of a defendant who had yelled loudly and profanely at police officers. Initially, the defendant was yelling with respect to the officers' treatment of a third party whom they had arrested, but after her own arrest the defendant began yelling, "F*** you. I haven't done anything." Noting that it was clear that the defendant's tirade "was a protest about the legality and appropriateness of police conduct," our supreme court concluded that the defendant's expressive activity was political speech and stated, "When a citizen's protest is occasioned by the conduct of government actors and regards a matter of public concern, it is squarely within the public pale." Price, 622 N.E.2d at 961.

Price, by itself, might support the conclusion that Wells's tirade, in part directed toward Troopers Brown and Coryea and indirectly toward Sergeant Maxwell, was political speech. In fact, our supreme court later clarified that portions of the Price defendant's tirade were not political in Whittington v. State, 669 N.E.2d 1363 (Ind. 1996). Chief Justice Shepard, who also authored Price. wrote for the majority, "where an individual's expression focuses on the conduct of a private party-including

the speaker himself or herself-it is not political." Id. at 1370. He noted that in Price, the defendant was protesting police treatment of another citizen before being warned to be quiet, at which time her expression shifted to a defense of her own conduct. Id. The Chief Justice then concluded, "It was the State's reliance on Price's pre-warning political expression to prove an essential element of the offense that was fatal to the conviction." Id. (emphasis added). Additionally, Whittington clarified that a defendant has the burden of establishing that particular speech is political, and if there is ambiguity about the nature of certain speech, courts should err on the side of concluding that it is not political. Id.

The particular facts of Whittington were that the defendant loudly protested police investigation of a domestic complaint, which led to his arrest and conviction for disorderly conduct. The majority had "little difficulty concluding that his expression was not political" where the defendant merely was protesting that he had not done anything and that the other witnesses were lying. Id. at 1370-71. Later, in Johnson v. State, 719 N.E.2d 445 (Ind. Ct. App. 1999), this court addressed the defendant's disorderly conduct delinquency adjudication after he loudly protested that he was not going to adhere to his probation conditions. We concluded that the statements were at best ambiguous and, therefore, not political. Id. at 449. We reasoned,

> Although it is not implausible that Johnson was criticizing the State for imposing unfair probation conditions, it is equally plausible that Johnson was simply commenting on his own conduct and intentions. Johnson merely stated that he was not going to attend the required classes. This comment could be construed to reflect nothing more than Johnson's opinion that he can do what he wants, when he wants.

Id.

Additionally, in Shoultz v. State, 735 N.E.2d 818, 827 (Ind. Ct. App. 2000), trans. denied, we held that words directed at a policeman about the treatment of another person were political speech. We acknowledged, however, that a "speaker's defense of his or her own conduct to a police officer is not political . . . ." Shoultz, 735 N.E.2d at 826. What invalidated the disorderly conduct conviction in

that case was that it was based in part on the defendant's protests regarding a police officer's alleged "hassling" of a fellow motorcyclist, not solely upon any later attempt by the defendant to protest his innocence. Id. at 827. Similarly, in the U.M. case, what was held to be political speech was the defendant's complaints to a police officer regarding his forcing one of the defendant's companions to keep his arms up. See U.M., 827 N.E.2d at 1193. There was no indication that the disorderly conviction was based solely on the defendant's protestations of his own innocence; as we noted, "U.M. was expressing himself regarding the legality and appropriateness of police conduct toward his companion." Id. (emphasis added).

Here, Wells was not protesting police treatment of a third party. He was angry that an officer had stopped him for a relatively minor seat belt violation. Wells also was quick to inform the officer that, because of local political machinations, he believed he had been "set up."[9] However, no one forced Wells to drive after he had consumed alcohol, and it was his failure to fasten his seat belt that occasioned the stop.

Wells's loud diatribe was only about himself and his predicament. Although we now know that Wells's political adversaries had called his situation to the attention of law enforcement, Wells did not know that with certainty at the time of his tête-à-tête with Trooper Brown. Moreover, Wells was not "set up" in the sense of having evidence against him fabricated; he actually did commit the infraction of driving without a fastened seat belt and the crime of operating a vehicle while intoxicated.

We conclude that at best, Wells's speech in this situation was ambiguous as to whether it was political speech. Thus, we must err on the side of concluding that it was not political. See Whittington, 669 N.E.2d at 1370. In one sense, Wells's speech could be seen as "political" because he was alleging impropriety in the conduct of certain public officials. On the other hand, the speech reasonably can be viewed simply as an attempt by Wells to "talk his way out

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[9] There might have been more than a grain of truth to these allegations. However, subjective reasons for initiating a traffic stop are irrelevant so long as there is objective, reasonable suspicion that a driver has violated some provision of the traffic code. See Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001). Wells has challenged neither the legality of his initial stop nor the ensuing investigation into whether he was operating while intoxicated.

of a ticket or further investigation by the police into whether he was operating while intoxicated. Wells was not coming to the defense of a third party whom he believed was being treated unfairly by the police or other public officials. Under Whittington and Johnson, such speech is not political.

Having concluded that Wells's speech was not political, the constitutionality of his conviction for disorderly conduct is evaluated "under standard rationality review." Id. A conviction for disorderly conduct that does not involve political speech is constitutional if it is reasonable to conclude that the defendant's expressive activity "was an `abuse' of the right to speak or was, in other words, a threat to peace, safety, and well-being." Id. at 1371. Here, there is no doubt that Wells's diatribe met this standard. The loudness and anger of his diatribe compelled a nearby resident, Chanvisanuruk, to call 911 because Wells was disturbing his ability to complete a school assignment and because he feared for the safety of Trooper Brown. Clearly, Wells's speech posed a threat to peace, safety, and well-being. Wells's conviction for disorderly conduct does not violate Article 1, Section 9 of the Indiana Constitution.

Conclusion

Wells has failed to demonstrate reversible error regarding the conduct of his trial in his claims regarding the jury venire, denial of his motion for a continuance, and prosecutorial misconduct. He also has not established that the OWI statutes are void for vagueness. Finally, we conclude that his conviction for disorderly conduct does not violate the free speech provision of the Indiana Constitution. We affirm.

Affirmed.

SHARPNACK, J., concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

IN THE COURT OF APPEALS OF INDIANA

SCOTT D. WELLS,	)	
Appellant-Defendant,	)	
	)	
vs.	)	
	)	No.53A01-0405-CR-229
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

RILEY, Judge concurring in part and dissenting in part.

I concur with Parts I, II, III, and IV. I respectfully dissent to Part V and would vacate Wells' conviction for disorderly conduct. Unlike the majority, I conclude that in protesting his stop and arrest, Wells engaged in protected political speech.

Our supreme court has explained that Article I, Section 9 of the Indiana Constitution contemplates a broad notion of expressive activity, extending to all subjects and every conceivable mode of expression, including the projection of any words in any manner. *Whittington v. State,* 669 N.E.2d 1363, 1368 (Ind. 1999). In addition, this court has previously held that the language of Section 9 "affirms the rights of expression in language much more comprehensive than the First Amendment." *Mishler v. MAC Systems, Inc., 771*

N.E.2d 92, 97 (Ind. Ct. App. 2002). Thus, given the expansive language and reading of Section 9, there is no question that Wells was engaged in expressive activity, and that the state's action, convicting Wells of disorderly conduct, in effect restricted that expressive activity. *See Madden v. State,* 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003), *trans. denied.*

While I agree that not all political expression is shielded from criminal liability, I disagree with the majority's distinction in the present case between political speech pertaining to government misconduct toward a third party and such misconduct pertaining to one's own self. *See id. at* 1157. My reading of *Price v. State* leads me to conclude that Price engaged in political speech when she objected to the arrest of a third party, as well as when she objected to her own arrest. *Price v. State,* 622 N.E.2d 954, 964-65 (Ind. 1993), *reh'g denied.* Among Price's statements to the police officer were, "F--- you," and "I haven't done anything." *Id.* at 957. The *Price* court concluded that this expressive activity was political speech because Price was protesting the legality and appropriateness of police conduct. Likewise, my reading of the recent case, *U.M. v. State,* is that U.M. was not just protesting the police officers' treatment of his friend, but also protesting the general conduct of the officers. Among U.M.'s statements were, "You guys are all racists," and "f--- the police." *U.M. v. State,* 827 N.E.2d 1190, 1191 (Ind. Ct. App. 2005). Albeit reluctantly, based on the precedent of *Price,* we ultimately concluded that U.M. was engaged in expressive activity that targeted the conduct of a government actor, the police. *Id.* at 1193.

Similar to *Price* and U.M., I find that the thrust of Wells' speech was to comment on actions by government actors, specifically the arresting police officers' possible involvement in a set-up by other government officials. Accordingly, I would hold that the restriction on Wells' criticism of the officers imposed a material burden on his fundamental right to free speech. *See id.* at 1192. Even though, as the *Price court also* noted in that case, Wells' conduct may have been sufficient to *support* a conviction for public nuisance, in light of the boundaries imposed on our disorderly conduct statute by the Indiana Constitution's protection for freedom of expression, I conclude that Wells was improperly convicted of disorderly conduct.

CLERK SUPREME COURT,
COURT OF APPEALS AND TAX COURT
STATE OF INDIANA
217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365
Kevin S. Smith, Clerk

Cause Number: 53A01-0405-CR-00229

Lower Court Number: 53CO40211FD1030

DAVID COLMAN
114 SOUTH GRANT
BLOOMINGTON, IN 47401

WELLS, SCOTT -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT **has on this day** 10/26/06

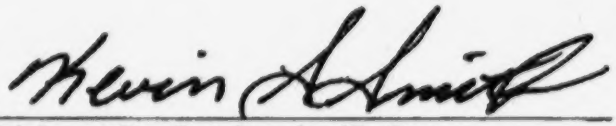
THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANTS PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court, this 26TH day of OCTOBER, 2006

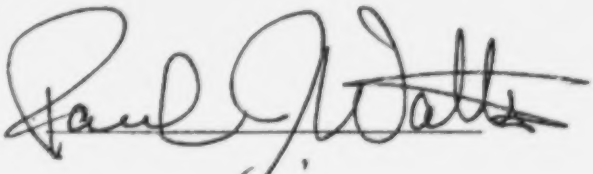
S/Kevin S. Smith



Clerk, Supreme Court, Court of Appeals and Tax Court

CERTIFICATE OF SERVICE

I, Paul J. Watts, a member of the Bar of this Court, hereby certify that on this 23rd day of January, 2006, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed. First class postage pre-paid, to the Attorney General of Indiana, Steven Carter, 5th Floor Government Center S, 302 W. Washington, Street, Indianapolis, IN 46204. I further certify that all parties required to be served have been served.



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